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No. 86-564

In The
# Supreme Court of the United States
October Term, 1986

PHILLIP J. KIRK, Secretary, North Carolina Department of Human Resources, in his official capacity, *et al.*,

*Appellants,*

v.

BEATY MAE GILLIARD, *et al.*,

*Appellees.*

**On Appeal from the United States District Court for the Western District of North Carolina**

## BRIEF FOR APPELLANTS

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## QUESTIONS PRESENTED

I. Whether the District Court erred in holding that 42 U.S.C. (Supp. II) § 602(a)(38), which requires that all child support payments are to be considered as household income (and thus assigned to the State) in determining eligibility of a family unit for AFDC benefits, results in a deprivation of property based on a child's unchosen family membership and therefore violates the Fifth and Fourteenth Amendments to the United States Constitution.

II. Whether the District Court erred in ordering State Defendants to make retroactive payments to the identified class members when the amended statute mandated the conduct of the State Defendants and the Eleventh Amendment to the United States Constitution bars this award of retroactive payments.

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* Rule 28.1 is not applicable in this case.

TABLE OF CONTENTS

# TABLE OF AUTHORITIES

Pages

CASES

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued



STATUTES

## TABLE OF AUTHORITIES—Continued

## REPORTS OF OPINIONS BELOW

The opinion of the district court in *Gilliard v. Kirk* is reported at 633 F.Supp. 1529 (W.D.N.C. 1986). A copy thereof is printed in the Jurisdictional Statement at pages A1-A80. An order which clarified the opinion, filed July 3, 1986, is not reported and a copy thereof is reprinted in the Jurisdictional Statement at pages A81-A86. The opinion of the district court in *Gilliard v. Craig* is reported at 331 F.Supp. 587 (1971), *aff'd without opinion,* 409 U.S. 807 (1972). A copy thereof is printed in the Jurisdictional Statement at pages A87-A107.

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## JURISDICTION

The judgment of the district court for the Western District of North Carolina was entered on July 14, 1986. (J.S. at A-121). Notice of Appeal to this Court was filed on August 1, 1986. (J.S. at A-132). A Motion for Reconsideration was denied by the district court on August 25, 1986. (J.S. at A-128). Supplementary Notice of Appeal to this Court was filed on September 2, 1986. (J.S. at A-137). The Jurisdictional Statement was docketed with this Court on September 29, 1986. This Court noted probable jurisdiction on December 8, 1986. The Jurisdiction of this Court rests upon 28 U.S.C. § 1252.

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## STATUTE AND CONSTITUTIONAL PROVISIONS INVOLVED

*42 U.S.C. (Supp. II) § 602(a)(38).* State plans for aid and services to needy families with children; contents; approval by Secretary; records and reports; treatment of earned income advances.

(a) Contents. A State plan for aid and services to needy families with children must—

• • •

(38) provide that in making the determination under paragraph (7) with respect to a dependent child and applying paragraph (8), the State agency shall (except as otherwise provided in this part [42 USCS §§ 601 et seq.]) include—

(A) any parent of such child, and

(B) any brother or sister of such child, if such brother or sister meets the conditions described in clauses (1) and (2) of section 406(a) [42 USCS §606(a)], if such parent, brother, or sister is living in the same home as the dependent child, and any income of or available for such parent, brother, or sister shall be included in making such determination and applying such paragraph with respect to the family (notwithstanding section 205(j) [42 USCS § 405(j)], in the case of benefits provided under title II [42 USCS §§ 401 et seq.];

*Fifth Amendment, United States Constitution:*

No person shal be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against

himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation.

*Eleventh Amendment, United States Constitution:*

The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another state, or by citizens or subjects of any foreign state.

*Fourteenth Amendment, United States Constitution:*

1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

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## STATEMENT OF THE CASE

The Aid to Families with Dependent Children (AFDC) program was established in 1935 to provide financial assistance to families with needy dependent children. Social Security Act, Chapter 531, Title IV, §§ 401-406, 49 Stat. 627-629, 42 U.S.C. (& Supp. II) § 601 *et seq.* It is a joint state-federal program. This suit initially began on May 5, 1970 when the plaintiffs filed a complaint in the United States District Court for the Western District of North Carolina challenging the legality of certain policies and regulations of the State of North Carolina in administer-

ing its AFDC program. Specifically, the conduct of the State which was contested was the consideration of child support income as a resource available to the entire family unit in determining its eligibility for AFDC benefits and the amount of benefits received. (J.A. at 17-29). In 1971 a three-judge court held that, both under the existing federal statutes and state regulations, it was improper to include child support payments as family income and enjoined the State from this conduct. *Gilliard v. Craig,* 331 F. Supp. 587 (1971), *aff'd without opinion,* 409 U.S. 807 (1972).

In 1984 Congress amended the Social Security Act provisions on which *Gilliard v. Craig, supra,* was based. Deficit Reduction Act of 1984 (DEFRA), Pub. L. No. 98-369, § 2640, 98 Stat. 494, 42 U.S.C. (Supp. II) § 602(a)(38). The amended statute explicitly requires that a parent and any sibling or half-sibling who reside with with a dependent child applying for or receiving AFDC benefits must be included in the AFDC filing unit. Prior to 1984, a family applying for or receiving AFDC assistance could exclude at will from the filing unit a member receiving income that, if counted in the eligibility determination, would reduce the amount of the family's AFDC benefits or would have terminated its eligibility altogether. The present federal statutes, following the 1984 amendment, require that all persons enumerated in 42 U.S.C. (Supp. II) § 602 (a)(38) must be included in the AFDC filing unit and all income received by the filing unit must be considered in determining the family's initial eligibility for AFDC benefits and the level of benefits an eligible family will receive. 42 U.S.C. (Supp. II) § 601 *et seq.* Since 1975, the AFDC program has required, as a condition of eligibility,

that an applicant for assistance must assign to the state any right to receive child support payments. Social Services Amendments of 1974, Pub.L. No. 93-647, § 101(c)(5)(C), 88 Stat. 2359, 42 U.S.C. § 602(a)(26)(A). Since 1975 the laws of the State of North Carolina have provided that "[b]y accepting public assistance for or on behalf of a dependent child or children, the recipient shall be deemed to have made an assignment to the State or to the county from which such assistance was received of the right to any child support owed for the child or children up to the amount of public assistance paid." N.C.G.S. § 110-37. In October of 1984 the State of North Carolina implemented the new DEFRA provisions.

On May 30, 1985, plaintiffs filed a motion for further relief, asking the court to enforce the 1971 injunction or, in the alternative, to declare that 42 U.S.C. (Supp. II) § 602(a)(38) was unconstitutional. (J.A. at 30-34). The State Defendants' motion for the convening of a three-judge panel was denied on August 9, 1985. (J.S. at A-115). The State's motion to file a third-party complaint against the Secretary of Health and Human Services was granted on August 15, 1985. (J.S. at A-141).

On May 7, 1986 the district court issued its opinion. *Gilliard v. Kirk*, 633 F.Supp. 1529 (W.D.N.C. 1986). The court held that the State of North Carolina had properly interpreted 42 U.S.C. (Supp. II) § 602(a)(38) by requiring child support income of co-resident siblings or half siblings to be included as a family resource. *Id.* at 1543. The court then held the statute to be unconstitutional by applying a standard of "heightened scrutiny." *Id.* at 1556. The court further held that "retroactive benefits are properly

available in this case" because the State of North Carolina was still bound by the restrictions of the 1971 injunction at the time it conformed its conduct to the mandates of the amended statute in 1984. *Id.* at 1563. On July 3, 1986 the court issued an order further clarifying its opinion which states that it "finds the statute unconstitutional because it imposes a financial penalty on children receiving adequate child support. . . . Such a deprivation of property based on a child's unchosen family membership violates due process and equal protection principles." (J.S. at A-82). Also on July 3, 1986 the court issued its final order which granted "Prospective Relief" by enjoining the State of North Carolina as follows:

> "2. State defendants, their officers, agents, servants, employees and those persons acting under or in concert or participation with them, are hereby restrained and enjoined from enforcing any and all statutes, regulations, rules or policies that require an AFDC applicant or recipient to include in the AFDC application all children living with the applicant or recipient when that would require the inclusion of children who receive adequate child support and would not otherwise be included in the AFDC unit. The state defendants are also restrained and enjoined from counting the income of children not voluntarily included in an assistance application as income available to the AFDC unit.
>
> 3. State defendants are likewise enjoined from enforcing any statutes, regulations, rules or policies that require an AFDC applicant or recipient to assign to the state a child's rights to receive child support unless the applicant wishes to obtain AFDC for that child." (J.S. at A-123).

"Retroactive Relief" was granted as follows:

> "4. State defendants are ordered to pay to the members of the class the AFDC benefits they would have

> received but for the unlawful reduction, termination or denial from October, 1984, to the present. State defendants will also return all child support members of the class would have received but for the unlawful inclusion of these children in the AFDC standard filing unit and subsequent assignment of their child support to the state, from October, 1984, to the present." (J.S. at A-124).

The district court also granted retroactive notice relief against the State. (J.S. at A-124 to A-126).

On August 25, 1986 the district court stayed its order pending appeal (J.S. at A-148), but refused to reconsider its order. (J.S. at A-128).

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## SUMMARY OF ARGUMENT

In its first argument, the State of North Carolina adopts the argument of the Secretary of Health and Human Services in that the district court erred in holding that 42 U.S.C. (Supp. II) § 602(a)(38) was violative of the Fifth and Fourteenth Amendments to the Constitution of the United States. Specifically, the State Defendants believe the district court erred in applying a "heightened scrutiny" standard of review in its analysis of the statute. The proper standard for judicial review of social legislation is "minimal scrutiny." *Lyng v. Castillo,* — U.S. —, 106 S.Ct. 2727, 2729-2730 (1986). There is no constitutional violation presented by the requirements of this statute because its mandates have a reasonable basis and are rationally related to several legitimate governmental interests, including federal bud-

get concerns and Congress's recognition of the reality that households actually share expenses, so scarce public funds should be provided to those most in need. *See, Califano v. Aznavorian,* 439 U.S. 170 (1978). The amended statute merely sets out new eligibility requirements for the receipt of AFDC benefits and thus does not effect a "direct taking." The district court was not correct in its interpretation that North Carolina law would prohibit the assignment of the right to receive child support to the State because the custodial parent cannot assign away the private property of the minor child. The law of North Carolina mandates that child support is to be used to "benefit" the child and the custodial parent, as trustee for the child, has the discretionary authority to make the decision that the advantages the child would receive from participation in the AFDC program would be in the child's best interest. *See,* N.C.G.S. § 50-13.4(d); *Goodyear v. Goodyear,* 257 N.C. 374, 126 S.E.2d 113 (1962); *Lifsey v. Bullock,* 11 F.Supp. 728 (D.C.N.C. 1935); *Re Lassiter,* 43 N.C.App. 525, appeal dismissed, 299 N.C. 120 and *affirmed* 452 U.S. 18 (1981).

In its second argument, the State of North Carolina shows that the district court erred in ordering the State Defendants to pay retroactive benefits to the individual class members. The district court reasoned that "[r]etroactive benefits were properly available" because the State was still bound by a 1971 injunction which had not been vacated, modified or reversed. The 1971 injunction was based upon statutory grounds and merely forbade the State Defendants to engage in conduct which was illegal under the Social Security Act as then written. *Gilliard v. Craig,* 331 F.Supp. 587 (1971), *aff'd without*

*opinion,* 409 U.S. 807 (1972). When the Social Security Act was amended in 1984, the conduct which was illegal in 1971 became legal and required. The specific provisions of the 1971 injunction were never violated. Even if this Court should find that in 1984 the State Defendants were still bound by the 1971 injunction, the prior injunction was vacated as a matter of law when Congress changed the statutory grounds upon which the injunction was based and mandated the very conduct which was previously forbidden. *See, Pennsylvania v. Wheeling & Belmont Bridge Co.,* 18 How. (59 U.S.) 421 (1855). Furthermore, the award of retroactive damages against the State Defendants by a federal court is absolutely barred by the Eleventh Amendment to the Constitution of the United States. *See, Edelman v. Jordan,* 415 U.S. 651 (1974). There has been no State nor Congressional waiver of the State Defendants' Eleventh Amendment immunity. *See, Atascadero State Hospital v. Scanlon,* — U.S. —, 105 S.Ct. 3142 (1985). A judge-made injunction cannot override the explicit limitation on federal jurisdiction contained in the Eleventh Amendment. *See, Pennhurst State School and Hospital v. Halderman,* 465 U.S. 89 (1984). Even if the 1971 injunction were regarded as a continuing legal obligation on the part of the State Defendants, retroactive relief is still barred by the Eleventh Amendment. *See, Papasan v. Allain,* — U.S. —, 106 S.Ct. 2932 (1986).

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## ARGUMENT

### 42 U.S.C. § 602(a)(38) DOES NOT VIOLATE THE FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

For its first argument, the State of North Carolina adopts the argument contained in the Brief on the Merits of the Secretary of Health and Human Services in the appeal of *Bowen v. Gilliard*, No. 86-509, which is consolidated with *Gilliard v. Kirk*, for hearing.

The State Defendants agree with the Federal Defendants that the district court erred in holding that 42 U.S.C. (Supp. II) § 602(a)(38) was violative of due process and equal protection principles by applying a "heightened scrutiny" standard of review. *Gilliard v. Kirk*, 633 F.Supp. 1529, 1556 (W.D. N.C. 1986). This Court has recently reaffirmed its long and consistent line of opinions which point unerringly to the principle that the proper standard for judicial review of social legislation is MINIMAL SCRUTINY. *Lyng v. Castillo*, — U.S. —, 106 S.Ct. 2727, 2729-2730 (1986). *See also, Schweiker v. Wilson*, 450 U.S. 221 (1981); *Califano v. Jobst*, 434 U.S. 47 (1977); *Weinberger v. Salfi*, 422 U.S. 749 (1975); *Dandridge v. Williams*, 397 U.S. 471, *reh'g denied*, 398 U.S. 914 (1970). The very nature of social welfare legislation necessitates drawing sometimes arbitrary lines among categories of people, but as long as the classification has a reasonable basis, it does not violate the Constitution. *Califano v. Aznavorian*, 439 U.S. 170 (1978). The AFDC family filing unit mandated by 42 U.S.C. (Supp. II) § 602(a)(38) is rationally related to numerous legitimate governmental interests, including the reduction of federal expenditures,

the realignment of a family member's need determination with the realities of shared household expenses, and the limitation of scarce public funds to those most in need.

In addition, all defendants are in agreement that 42 U.S.C. (Supp. II) § 602(a)(38) does not effect a *direct* taking of child support. Participation in the AFDC program is voluntary on the part of the recipient. When DEFRA amended the statute in 1984, it merely set out new criteria for participation in the program. Congress of course has the power to make eligibility rules for public programs which are rationally related to a legitimate legislative objective. *Weinberger v. Salfi,* 422 U.S. 749 (1975); *cf. Ruckelshaus v. Monsanto Co.,* 467 U.S. 986, 1007 (1984). This Court in *Wyman v. James,* 400 U.S. 309 (1971), has previously rejected constitutional challenges to similar conditions of eligibility for public assistance, emphasizing the voluntary right of the potential AFDC recipient to refuse to accede to certain conditions of eligibility with the consequence of refusal being the cessation of public assistance.

Furthermore, the basis for the *Gilliard v. Kirk* decision that an unconstitutional "taking" has occurred is grounded upon the district court's interpretation of North Carolina child support laws. *Gilliard v. Kirk,* 633 F.Supp. 1529, 1548-1549 (W.D.N.C. 1986). The court's analysis of the law of the State of North Carolina in this area is far too restrictive and is in error. The relevant state statutes read, in pertinent part, as follows: "Any parent . . . having custody of a minor child . . . may institute an action for the support of such child. . . ." N.C.G.S. § 50-13.4(a). "Payments ordered for the support of a minor child shall be in such amount as to meet the reason-

able needs of the child for health, education, and maintenance, having due regard to the estates, earnings, conditions, accustomed standard of living of the child and the parties, the child care and homemaker contributions of each party, and other facts of the particular case." N.C.G.S. § 50-13.4(c). "Payments for the support of a minor child shall be ordered to be paid to the person having custody . . . for the benefit of such child." N.C.G.S. § 50-13.4(d). From the foregoing statutes and two cases, *Goodyear v. Goodyear,* 257 N.C. 374, 126 S.E.2d 113 (1962) and *Tyndall v. Tyndall,* 270 N.C. 106, 153 S.E.2d 819 (1967), the district court reached its conclusion that the custodial parent is bereft of any discretion to determine that the receipt of AFDC benefits for the entire family unit (with the attendant assignment of child support rights to the State as required by state law in N.C.G.S. § 110-37) would be in the best interest or "benefit" of a minor child possessing the right to receive child support. The *Goodyear* and *Tyndall* opinions merely enunciate the settled law of North Carolina that child support is received by the custodial parent, as trustee, for the "benefit" of the child(ren); the trustee cannot "profit" herself from the money received. *See, Goodyear v. Goodyear,* 257 N.C. 374, 126 S.E.2d 113 (1962); *Tyndall v. Tyndall,* 270 N.C. 106, 153 S.E.2d 819 (1967). Both of these cases revolved around allegations that the custodial parent was individually bettering herself financially from child support monies at the expense of the children. These North Carolina cases simply do not stand for the proposition that the custodial parent has no discretion in determining how to utilize child support payments for the "benefit" of the child receiving support. North Carolina has long recognized the right of a parent in the good

faith management of a minor child's property for the benefit of the child. *See, Lifsey v. Bullock,* 11 F.Supp. 728 (D.C.N.C. 1935); *See also, Re Lassiter,* 43 N.C. App. 525, *appeal dismissed,* 299 N.C. 120 and *affirmed* 452 U.S. 18 (1981). Surely, a custodial parent, as trustee, could determine reasonably and rationally that it would be in the best interests of the child entitled to child support that an assignment of the right to support be made to the State in order that (1) a steady source of AFDC income would be received instead of erratic or unpaid child support, (2) the child would be automatically entitled to receive free medical care under the Medicaid program because of inclusion in the AFDC filing unit (*see* 42 U.S.C. (& Supp. II) 1396a(a)(10)(A)(i)(1)), and (3) the standard of living of the family in which the child lives would be enhanced. The choice to apply for AFDC benefits is voluntary. There is no North Carolina law which would prevent the custodial parent of a child entitled to receive child support from making a decision that it would be in the best interests of that child to receive AFDC benefits and comply with its requirements in order to do so.

As stated previously, the new family filing unit now mandated by 42 U.S.C. (Supp. II) § 602(a)(38) is one of the conditions of eligibility for receipt of benefits under the AFDC program. Indeed, as a voluntary participant in the AFDC program, North Carolina has adopted federal laws governing the program. N.C.G.S. § 108A-25; N.C.G.S. § 108A-27; *cf. Lackey v. Department of Human Resources,* 306 N.C. 231, 293 S.E.2d 171 (1982) (Medicaid regulations). Thus the law of North Carolina regarding child support income of AFDC recipients is in fact the eligibility requirement of 42 U.S.C. § 602 (Supp.

II)(a)(38) and the assignment requirement of 42 U.S.C. § 602(a)(26)(A). The district court's interpretation of North Carolina law regarding child support was in error.

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## ARGUMENT II

**THE DISTRICT COURT ERRED IN ORDERING THE STATE OF NORTH CAROLINA TO PAY RETROACTIVE BENEFITS TO INDIVIDUAL CLASS MEMBERS BASED UPON REASONING THAT THE STATE HAD VIOLATED AN OUTSTANDING 1971 INJUNCTION WHEN THE AMENDED STATUTE MANDATED THE CONDUCT FOLLOWED AND THE ELEVENTH AMENDMENT TO THE UNITED STATES CONSTITUTION BARS THIS AWARD OF RETROACTIVE DAMAGES.**

In its final order, filed July 3, 1986, the district court ordered retroactive relief against the State of North Carolina, in pertinent part, as follows:

RETROACTIVE RELIEF

"4. State defendants are ordered to pay to the members of the class the AFDC benefits they would have received but for the unlawful reduction, termination or denial from October, 1984, to the present. State defendants will also return all child support [which] members of the class would have received but for the unlawful inclusion of these children in the AFDC standard filing unit and subsequent assignment of their child support to the State from October, 1984, to the present.

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> 7. Within thirty (30) days of the filing of the list [of identified class members], state defendants shall make a retroactive payment of all amounts due to the identified class members who have remained on AFDC and for whom defendants have sufficient information to calculate the appropriate payment.
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> ****
>
> 9. Within thirty (30) days of receipt by the county Department of Social Services of all information necessary to calculate a . . . retroactive benefit [of an identified class member who did not remain on AFDC], the state defendants shall pay the recipent." (J.S. at A-124, A-126).

In addition to ordering retroactive monetary relief, the court also ordered retroactive notice relief in the form of mailings, sign displays and public service announcements calculated to apprise class members of their entitlement to retroactive benefits, as well as later mailings to accompany each payment authorized which would explain the payment and set forth appeal rights. (J.S. at A-124 to A-126).[1]

For several apparent reasons, the district court was in error in its award of the above retroactive damages against the State of North Carolina.

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[1] The Order filed July 3, 1986 was stayed pending appeal by Order of the Court filed August 25, 1986. (J.S. at A-148).

**A. The District Court erred in ordering the State of North Carolina to pay retroactive benefits to individual class members based upon its reasoning that the State had violated an outstanding 1971 injunction in light of the directives of the former injunction which merely enjoined the State from statutorily illegal conduct in violation of the Social Security Act as then written.**

In *Gilliard v. Kirk*, 633 F.Supp. 1529, 1563 (W.D.N.C. 1986), Judge McMillan found that "[r]etroactive benefits are properly available in this case" because the State "was still acting under the restrictions imposed by this court's earlier injunction, which forbade the involuntary attribution of child support income to a family in which some children receive adequate child support income and some received only AFDC." A review of the 1971 injunction and its surrounding circumstances clearly demonstrates the fallacy of the district court's reasoning in 1986.

In March of 1970, under state policy then existing, the State defendants reduced the monthly AFDC benefits to the Gilliard family by the amount of a monthly child support payment which was being made by the father of one of the children in the family. This decision was affirmed by the State on appeal. In May 1970 plaintiffs instituted a lawsuit in the United States District Court for the Western District of North Carolina. In their complaint they sued individually and as members of a class asking that the State defendants be enjoined from, among other things: "(a) including children in AFDC grants automatically, without either application having been made or consent having been given by the head of the AFDC household; (b) including children in AFDC grants who

are receiving adequate independent support; and (c) characterizing independent support payments to individual AFDC recipients as resources properly deductible in calculating monthly AFDC payments." (J.A. at 28). The grounds for the plaintiffs' prayer for relief was that the aforesaid actions of the State were in violation of the Due Process and Equal Protection Clauses of the Fourteenth Amendment and of the Social Security Act of 1935, as amended, Title 42 U.S.C. Section 601 *et seq.* (J.A. at 22). The case was heard on November 5, 1970 before a three-judge court. In *Gilliard v. Craig,* 331 F.Supp. 587 (1971), *aff'd without opinion,* 409 U.S. 807 (1972), the State's conduct, in automatically including child support as a resource available to the family and deducting the same from AFDC benefits otherwise payable, was held to be illegal.

The Memorandum of Decision and Order, decided June 10, 1971, is clearly based upon statutory grounds; that is, that the aforestated conduct of the State defendants would be enjoined as being in violation of the Social Security Act as then written. The federal statute which regulated the distribution of AFDC benefits at the time of this holding was 42 U.S.C., Section 602(a)(7), which read:

> "A State plan for aid and services to needy families with children must ***(7)*** provide that the State agency shall, in determining need, take into consideration any other income and resources of any *child* or relative *claiming aid* to families with dependent children, or of any *other individual living in the same home* as such child and relative) whose needs the State determines should be considered in determining the need *of the child* or relative claiming such aid, as

> well as any expenses reasonably attributable to the earning of any such income; ***. (Emphasis added.)"

*Gilliard v. Craig, supra* at page 589.

The "Conclusion" of the opinion reads as follows, in pertinent part:

> "BOTH UNDER THE MOST RATIONAL INTERPRETATION OF 42 U.S.C., SECTION 602(a)(7), AND UNDER THE STATE'S OWN REGULATIONS, it is improper to include as family resources support payments belonging individually to Samuel Davis, Jr. Samuel Davis, Jr. is not a proper member of the group because he is not a "needy" child UNDER THE SOCIAL SECURITY ACT. . . . The defendants may not UNDER THE LAW reduce or continue to withhold the payment of AFDC benefits to members of the Gilliard family or any others of the class represented by the Gilliard family because of the presumed availability to an AFDC family of support payments which belong to one or more but not all of the members of that family." (Emphasis added).

*Gilliard v. Craig, supra,* at pages 593-594.

The 1971 decision in *Gilliard v. Craig,* which decided the plaintiffs' claims on statutory rather than constitutional grounds, was in accordance with rules of judicial discretion specifically approved by this Court and throughout the federal judiciary. The exact procedural posture in *Gilliard v. Craig* was present in *Hagans v. Lavine,* 415 U.S. 528 (1974), wherein recipients of AFDC benefits brought suit in federal court on the ground that a state regulation under the AFDC program violated the Equal Protection clause of the Fourteenth Amendment and also conflicted with the Social Security Act and implementing

regulations. The Court specifically held that "[g]iven a constitutional question over which the District Court had jurisdiction, it also had jurisdiction over the 'statutory' claim. . . . The latter was to be decided first and the former not reached if the statutory claim was dispositive." *Id.*, 415 U.S. at 543. The *Hagans* Court emphasized "the ordinary rule that a federal court should not decide federal constitutional questions where a dispositive nonconstitutional ground is available." *Id.*, 415 U.S. at 547.

Orders of a federal court should be read in terms of "the issues made and the relief sought and granted." *Haskell v. Kansas Natural Gas Co.*, 224 U.S. 217, 223 (1912). In *Gilliard v. Craig* the injunctive relief sought by the plaintiffs was to prohibit certain conduct by the State defendants and was granted on the grounds that the conduct was in violation of the Social Security Act as it stood before the court in 1971.

The language of an injunction should be as specific as possible in order that the enjoined party can follow its mandates without fear of being held in contempt. *Pasadena City Board of Education v. Spangler*, 427 U.S. 424 (1976). The ENTIRE PROSPECTIVE RELIEF ordered by the Court in *Gilliard v. Craig* is contained in its Judgment filed December 13, 1971 and reads as follows:

> "3. *Prospective Relief.* It is further Ordered, Adjudged, and Decreed that the Defendants, their officers, agents, servants, employees, and those persons acting under or in concert or participation with them, be, and they hereby are restrained and enjoined from directly or indirectly reducing, or continuing to reduce, withholding, or continuing to withhold, the payment to AFDC beneficiaries of any funds on the basis of crediting outside income or resources of one or

> more members of the family group WITHOUT FIRST DETERMINING THAT SUCH INCOME IS LEGALLY AVAILABLE TO ALL MEMBERS OF THE FAMILY GROUP." (J.S. at A-110). (Emphasis added)

Thus, the conduct of the State defendants which was enjoined in 1971 was the improper reduction or withholding of AFDC benefits unless it was "FIRST DETERMIN[ED]" that the outside income or resources to be credited was "LEGALLY AVAILABLE" to all family members. Although not a model of clarity, the Memorandum of Decision in *Gilliard v. Craig* states that the inclusion of the child support payment as a resource available to the entire family was not in accordance with 42 U.S.C., Section 602(a)(7) "which, as we read [the statute], authorizes state agencies administering the plan to consider resources of a child in determining the needs *of the child*, but does not require nor authorize that the resources available only to a child living in the home should be treated as resources available to the family at large." *Gilliard v. Craig*, 331 F.Supp. 587, 593 (1971), *aff'd without opinion*, 409 U.S. 807 (1972). The opinion also cited decisions which it believed affected the issue of the presumption of "available income" but correctly declined to extrapolate that these cases controlled on constitutional grounds. *Id.* The most rational, and State defendants would proffer the ONLY, reading of the 1971 injunction is that the State was enjoined from conduct which was not authorized by the Social Security Act as it was written in 1971.

In 1984 Congress amended the Social Security Act to specifically require that a parent and all siblings who

live in the same household with a dependent child must be included in the standard filing unit in order for the household to receive AFDC benefits. Deficit Reduction Act of 1984 (DEFRA), Pub. L. No. 98-369, § 2640, 98 Stat. 494, 42 U.S.C. (Supp. II) § 602 (a)(38). The amended statute reads, in pertinent part, as follows:

> "A State plan for aid and services to needy families with children must —
>
> * * * *
>
> provide that in making the determination under paragraph (7) with respect to a dependent child and applying paragraph (8), the State agency shall (except as otherwise provided in this part) include —
>
> (A) any parent of such child, and
>
> (B) any brother or sister of such child, if such brother or sister meets the conditions described in clauses (1) and (2) of section 606(a) [of this title], if such parent, brother, or sister is living in the same home as the dependent child, and any income of or available for such parent, brother, or sister shall be included in making such determination and applying such paragraph with respect to the family (notwithstanding section 405(j) of this title, in the case of benefits provided under subchapter II of this chapter)***."

After the State defendants conformed their conduct to the amended 1984 Social Security Act, the plaintiffs filed a motion for further relief on May 30, 1985, asking that the Court invalidate the new standard filing unit regulations enacted by the State and reaffirm the original 1971 injunction. (J.A. at 30-34). The judicial orders and opinions subsequent to the 1985 motion for further relief make it abundantly clear that the injunction of the *Gilliard*

*v. Craig* court was directed to the enjoining of conduct which was illegal under the Social Security Act as it was written in 1971.

First, following plaintiffs' motion, the State defendants filed a motion for a three-judge court which was denied on August 9, 1985. (J.S. at A-115). In the order denying State defendants' motion, Judge McMillan, who also wrote for the three-judge court in *Gilliard v. Craig,* stated as follows:

> "The [original] complaint was filed on May 5, 1970. The case was assigned to this judge, who requested a three-judge court to decide the merits of the case, pursuant to 28 U.S.C. § 2281. The complaint raised constitutional challenges to defendants' practice of calculating AFDC (Aid to Families with Dependent Children) benefits by presuming that child support payments belonging to one or more, but not all, members of the family were available to the entire family.
>
> After a hearing on the merits, the three-judge court, two to one, HELD THAT DEFENDANTS' PRACTICE VIOLATED THE SOCIAL SECURITY ACT. AN INJUNCTION WAS ENTERED AGAINST DEFENDANTS. . . . THE CONSTITUTIONAL GROUNDS RAISED BY PLAINTIFFS WERE NEVER REACHED BY THE COURT; THE DECISION WAS MADE ON STATUTORY GROUNDS ONLY." (J.S. at A-112). (Emphasis added).

Secondly, in Judge McMillan's 1986 opinion upon which this appeal is based, he reiterated that in 1971 the court invalidated the North Carolina policy on the grounds that it "violated the intent of the Social Security Act AS THEN WRITTEN." *Gilliard v. Kirk,* 633 F.Supp. 1529, 1543 (W.D.N.C. 1986). (Emphasis added).

There has been no allegation in this case, nor can there be, that the State defendants did not comply with the 1971 injunction until the 1984 amendment of the Social Security Act. The statute in question, 42 U.S.C. (Supp. II) § 602(a)(38), now mandates the very conduct which the *Gilliard v. Craig* court said was violative of the Social Security Act as then written. Thus, what was ILLEGAL in 1971 was made LEGAL in 1984. The amended statute mandatorily made for the State Defendants the "determination" required under the 1971 injunction "that such income is legally available to all members of the family group." (J.S. at A-110). It thereby conclusively fulfilled the condition precedent contained in the 1971 injunction upon which the prohibition of the enjoined conduct depended.

The 1986 Memorandum of Decision in *Gilliard v. Kirk,* 633 F.Supp. 1529, 1547 (W.D.N.C. 1986) acknowledges that "[t]he regulatory distinction between 'actually' available and 'legally' available income corroborates the defendants' contention that Congress intended the attribution of child support income to other family members as a means of reducing AFDC expenditures." The district court then held that the attribution required by the amended statute was unconstitutional. It is, of course, well settled that in 1984, when the amended statute passed into effect, the State Defendants were to presume that the Act of Congress was constitutional. *See, Davies Warehouse Co. v. Bowles,* 321 U.S. 144 (1944). A presumedly constitutional mandate of a controlling federal statute is perforce "legal".

The 1971 injunction specifically enjoined the State from reducing or withholding AFDC benefits by credit-

ing child support income "without first determining that such income is legally available to all members of the family group." (J.S. at 110). In 1971 a mandatory inclusion of child support income was illegal under the Social Security Act as then written. With the passage of 42 U.S.C. (Supp. II) § 602(a)(38) as part of the 1984 federal Deficit Reduction Act, Congress made the "determination" that child support income "is legally available" to all members of the family group comprising an AFDC standard filing unit.

The State Defendants respectfully submit to this Court that the terms of the 1971 injunction have not been violated since in 1984 Congress made "legally available" what was previously illegal and the State thus correctly counted child support payments in determining eligibility for AFDC benefits.

**B. The District Court erred in ordering the State of North Carolina to pay retroactive benefits to individual class members because the 1984 amendment to the Social Security Act mandated the State's conduct forbidden by the 1971 injunction and thereby vacated the former order as a matter of law.**

In *Gilliard v. Kirk*, 633 F.Supp. 1529 (W.D.N.C. 1986), the district court held that retroactive benefits were properly available to the individual class members because the 1971 injunction still bound the State Defendants as it had not been stayed, vacated, or reversed, citing *Pasadena City Board of Education v. Spangler*, 427 U.S. 424 (1976); *Walker v. City of Birmingham*, 388 U.S. 307 (1967); *United States v. United Mine Workers of America*, 330 U.S. 258 (1947). State Defendants are not

proposing to this Court that it now overrule the above cases by holding that the State of North Carolina was free to ignore the federal injunction because it was invalid or unconstitutional. Rather, it is the State's contention that with the passage of 42 U.S.C. (Supp. II) § 602(a)(38), which in 1984 mandated the conduct formerly unauthorized by the Social Security Act and thus forbidden on statutory grounds by the 1971 injunction, the amended Social Security Act vacated the prior order as a matter of law.

It is of course well-established that injunctions are always subject to modification. "A continuing decree of injunction directed to events to come is subject to adaptation as events may shape the need." *United States v. Swift & Co.*, 286 U.S. 106, 114 (1932). This is necessarily required in order that the injunction not be "turned through changing circumstances into an instrument of wrong." *Id.*, 286 U.S. at 115.

State Defendants are not unmindful of the provisions of Rule 60(b) of the Federal Rules of Civil Procedure under which they could have applied to the district court for an order reversing the 1971 injunction in light of the passage of 42 U.S.C. (Supp. II) § 602(a)(38). Indeed, since the new circumstances involved a change in the statutory law rather than facts, it would have been an abuse of discretion for the district court to have denied the State's request. *See, System Federation No. 91, Railway Employes' Department, AFL-CIO, et al. v. Wright*, 364 U.S. 642 (1961). However, the opinion of the district court in *Gilliard v. Kirk* leads inevitably to the conclusion that because the State Defendants did not apply to the court

before complying with the amended Congressional mandate, the court had the power to continue to enforce rights which no longer had any basis in the law. Such an anomalous situation is the very essence of an injunction turning into "an instrument of wrong."

The State Defendants are not postulating to this Court that just any equitable change in circumstances would obviate the necessity of the enjoined party following established judicial procedures in petitioning the proper federal forum for relief. The State would limit its argument, that the 1971 injunction was vacated as a matter of law, to the specific factual situation presented by this case, i.e., an injunction based on statutory grounds which are later directly undercut by an Act of Congress. By so narrowly restrictly the question before the Court, ample precedent can be found to uphold the premise that damages cannot be awarded to compensate parties for the violation of an injunction that was no longer in effect as a matter of law.

The principal case to be found in this area of law is *Pennsylvania v. Wheeling & Belmont Bridge Co.*, 18 How. (59 U.S.) 421 (1855). In *Wheeling,* this Court was explicitly presented with the effect upon an outstanding injunction of a later change in the law by Congress. In that case, the Supreme Court ordered that a navigational obstruction created by a bridge across the Ohio River be eliminated inasmuch as the bridge interfered with river traffic in such a way as to be in conflict with certain Acts of Congress. Before the bridge was destroyed, Congress enacted legislation, at odds with the prior decision, declaring the bridge to be a post road and stating that it was a lawful structure in its present position and eleva-

tion. The plaintiffs nevertheless moved to enforce the original decree of the Court, contending that Congress had no authority to review or reverse a decision of the Supreme Court. This Court refused to enforce its original decree, noting that although a private right might ensue from a public right such as the obstruction of the waterway, that the part of the decree which directed the abatement of the obstruction, *THE PUBLIC RIGHT*, is executory and depends on whether the bridge continues to remain an obstruction under the terms of the present statute. The Court stated:

> "SO FAR, THEREFORE, AS THIS BRIDGE CREATED AN OBSTRUCTION TO THE FREE NAVIGATION OF THE RIVER, IN VIEW OF THE PREVIOUS ACTS OF CONGRESS, THEY ARE TO BE REGARDED AS MODIFIED BY THIS SUBSEQUENT LEGISLATION; AND, ALTHOUGH IT STILL MAY BE AN OBSTRUCTION IN FACT, IS NOT SO IN THE CONTEMPLATION OF LAW. . . .
>
> But it is urged, that the ACT OF CONGRESS cannot have the effect and operation to ANNUL THE JUDGMENT OF THE COURT ALREADY RENDERED, or the rights determined thereby in favor of the plaintiff. This, as a general proposition, is certainly not to be denied, especially as it respects adjudication upon the private rights of parties. When they have passed into judgment the right becomes absolute, and it is the duty of the court to enforce it. . . .
>
> BUT THAT PART OF THE DECREE, DIRECTING THE ABATEMENT OF THE OBSTRUCTION, IS EXECUTORY, A CONTINUING DECREE, which requires not only the removal of the bridge, but enjoins the defendants against any reconstruction or continuance. Now, whether it is a future existing or continuing obstruction depends up-

> on the question whether or not it interferes with the right of navigation. IF, IN THE MEAN TIME, SINCE THE DECREE, THIS RIGHT HAS BEEN MODIFIED BY THE COMPETENT AUTHORITY, so that the bridge is no longer an unlawful obstruction, IT IS QUITE PLAIN THE DECREE OF THE COURT CANNOT BE ENFORCED. There is no longer any interference with the enjoyment of the public right inconsistent with law, no more than there would be where the plaintiff himself had consented to it, after the rendition of the decree. Suppose the decree had been executed, and after that the passage of the law in question, can it be doubted but that the defendants would have had a right to reconstruct it? And is it not equally clear that the right to maintain it, if not abated, EXISTED FROM THE MOMENT OF THE ENACTMENT?" (Emphasis added).

*Id.*, 18 How. at 430-432.

The *Wheeling* Court held that the prior decree directing the alteration or abatement of the bridge could not "be carried into execution SINCE THE ACT OF CONGRESS [which amended the previous Act of Congress]." (Emphasis added). *Id.*, 18 How. at 436. The Court also held that no attachment would issue even though the defendants did not obey a later injunction to discontinue rebuilding the now-destroyed bridge since the Act of Congress afforded full authority to proceed in accordance with its mandates from the date of its enactment. *Id.* Thus, the *Wheeling* Court acknowledged and adhered to the principle that a decree or injunction of a federal court grounded on statutory law would be abated as a matter of law by a supervening Act of Congress which directly undercut the basis for the prior order of the court.

The precepts in *Wheeling*, being deep-rooted in equity, *see, Polites v. United States*, 364 U.S. 426, 438 (1960),

have not been abandoned by later jurisprudence. In *Oregon & California Railroad Company v. United States*, 238 U.S. 393 (1915), on appeal from the United States District Court of Oregon, this Court was presented with a dispute involving United States land grants to certain railroad companies. The Court construed the land grants as a law, as well as a grant, which must be obeyed until repealed. The land grants contained certain enforceable conditions and this Court specifically enjoined the railroads from violating the conditions contained therein. Recognizing the inherent power of Congress to amend its laws, the Court implicitly admonished the parties to attempt to effect legislative change. However, it emphasized that the railroads were still bound by the explicit injunction not to violate any covenants or conditions contained in the land grants themselves until Congress mandated different provisions in the applicable law. The Court then stated:

> "If Congress does not make such provision the defendants may apply to the District Court within a reasonable time, not less than six months, from the entry of the decree herein, for a modification of so much of the injunction herein ordered as enjoins any disposition of the lands and timber until Congress shall act, and the court in its discretion may modify the decree accordingly."

*Id.*, 238 U.S. at 439.

State Defendants would submit to this Court that inherent in the final statement quoted above, is the *Railroad Company* Court's opinion that subsequent action of Congress, if it amended the law upon which the Court's injunction was based, would itself vacate the outstanding injunction issued by the Court.

Other opinions of this Court have implicitly acknowledged that outstanding injunctions may be modified, reversed, or vacated by legislative action. In *System Federation No. 91, Railway Employes' Department, AFL-CIO v. Wright*, 364 U.S. 642 (1961), the Court held that where a change in the law made lawful what had previously been unlawful, it was an absolute abuse of discretion to refuse to modify an outstanding injunction based upon statutory rights. The Court's opinion relied heavily upon *Wheeling Bridge* and stated "the principles of the *Wheeling Bridge* case have repeatedly been followed by lower federal and state courts. We find no reason to recede from them." *System Federation No. 91, Railway Employes' Department, AFL-CIO v. Wright*, 364 U.S. 642, 650 (1961).

Additional authority for the State's position can be found in *Hodges v. Snyder*, 261 U.S. 600 (1923). In this case the Supreme Court of South Dakota held that an attempted organization of a consolidated school district was not authorized by any law then in force. The South Dakota Legislature subsequently passed a curative act which legalized and validated the school organization. However, before the curative act went into effect, the State Circuit Court, in accordance with the Supreme Court decision, entered judgment and permanently enjoined the defendants from the school consolidation. The plaintiffs filed a lawsuit and alleged that the later effective date of the curative act deprived them of private property rights vested by the prior judicial order. This Court, relying on the public right doctrine of *Wheeling Bridge*, held the plaintiffs' contention without merit. The *Hodges* Court stated:

> "It is true that, as they contend, the private rights of parties which have been vested by the judgment of

> a court cannot be taken away by subsequent legislation, but must be thereafter enforced by the court regardless of such legislation. *Pennsylvania v. Wheeling Bridge Co.*, 18 How. 421, 429. . . .
>
> THIS RULE, HOWEVER, AS HELD IN THE *WHEELING BRIDGE CASE* DOES NOT APPLY TO A SUIT BROUGHT FOR THE ENFORCEMENT OF A PUBLIC RIGHT, WHICH, EVEN AFTER IT HAS BEEN ESTABLISHED BY THE JUDGMENT OF THE COURT, MAY BE ANNULLED BY SUBSEQUENT LEGISLATION AND SHOULD NOT BE THEREAFTER ENFORCED. . . ." (Emphasis added).

*Id.*, 261 U.S. at 603.

Without going into detailed analysis, the State of North Carolina also brings to this Court's attention *United States v. Kubrick*, 444 U.S. 111, 125 (1979) ("But if we have [misconceived the intent of Congress], or even if we have not but Congress desires a different result, it may exercise its prerogative to amend the statute so as to effect its legislative will."); and *United States v. South Buffalo Railway Co.*, 333 U.S. 771, 774-775 (1948) (" . . . when the questions are of statutory construction, not of constitutional import, Congress can rectify our mistake, if such it was, or change its policy at any time. . . .").

The AFDC program is a joint federal-state public program to provide public welfare benefits. *Heckler v. Turner*, 470 U.S. 184 (1985). There is no private constitutional right to receive public assistance. *Harris v. McRae*, 448 U.S. 297 (1980); *Dandridge v. Williams*, 397 U.S. 471 (1970).

The prospective provisions of the 1971 injunction in this case affected only an ongoing public right based upon

statutory grounds. It was thereby vacated as a matter of law when the statutory grounds upon which it depended for its existence were abolished by the 1984 Act of Congress.

### C. The District Court erred in ordering the State of North Carolina to pay retroactive benefits to individual class members because this type of monetary award against a State Defendant in federal court is absolutely barred by the Eleventh Amendment to the United States Constitution.

The Eleventh Amendment reads:

> "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." U.S. CONSTITUTION, AMENDMENT XI.

As has been noted time and again, the applicable doctrines which surround the Eleventh Amendment do not arise from a literal reading of the Amendment itself. Rather they are the result of a long history of this Court's interpretation of the Constitutional Amendment primarily beginning in 1890 with *Hans v. Louisiana,* 134 U.S. 1 (1890), continuing with *Ex parte Young,* 209 U.S. 123 (1908), and actively enduring until the present day. A representative, but by no means exclusive, listing of more recent decisions includes *Employees v. Missouri Public Health Department,* 411 U.S. 279 (1973); *Edelman v. Jordan,* 415 U.S. 651 (1974); *Fitzpatrick v. Bitzer,* 427 U.S. 445 (1976); *Milliken v. Bradley,* 433 U.S. 267 (1977); *Quern v. Jordan,* 440 U.S. 332 (1979); *Hutto v. Finney,* 437 U.S. 678 (1978); *Pennhurst State School and Hospital*

*v. Halderman,* 465 U.S. 89 (1984); *Atascadero State Hospital v. Scanlon,* — U.S. —, 105 S.Ct. 3142 (1985); *Green v. Mansour,* — U.S. —, 106 S.Ct. 423 (1985); *County of Oneida v. Oneida Indian Nation of New York,* 470 U.S. 226 (1985); *Kentucky v. Graham,* — U.S. —, 105 S.Ct. 3099 (1985); *Papasan v. Allain,* — U.S. —, 106 S.Ct. 2932 (1986). A review of the above opinions reveals this Court's fundamental concern for the concept of federalism inherent in our government and laws, equilibrating both state autonomy and federal supremacy.

This Court recently reiterated its position that " . . . absent waiver by the State or valid congressional override, the Eleventh Amendment bars a damages action against a State in federal court. . . . This bar remains in effect when State officials are sued for damages in their official capacity." *Kentucky v. Graham,* — U.S. —, 105 S.Ct. 3099, 3107 (1985).

Any Congressional "waiver" of a State's Eleventh Amendment immunity to suit must be unequivocably specified in the language of the federal statute under which the State is brought into court. *Atascadero State Hospital v. Scanlon,* — U.S. —, 105 S.Ct. 3142, 3146-3148 (1985). Although Congress has the power to abrogate Eleventh Amendment immunity with respect to rights protected by the Fourteenth Amendment, an "unequivocal expression of congressional intent" is required. *Pennhurst State School and Hospital v. Halderman,* 465 U.S. 89, 99 (1984). Plaintiffs' original complaint alleged that their action arose under Title 42 U.S.C. Section 1983. (J.A. at 17). This Court has held that 42 U.S.C. § 1983 does not override States' Eleventh Amendment immunity. *Quern v. Jordan,* 440 U.S. 332, 342 (1979). There is no congressional over-

ridge of a participating State's sovereign immunity contained in the federal law governing the AFDC program. 42 U.S.C. §§ 601-615; *see also, Green v. Mansour,* — U.S. —, 106 S.Ct. 423 (1985).

Likewise, a State will not be deemed to have waived its immunity unless such waiver is "unequivocal". *Atascadero State Hospital v. Scanlon,* — U.S. —, 105 S.Ct. 3142, 3147 (1985). "Thus, in order for a state statute or constitutional provision to constitute a waiver of Eleventh Amendment immunity, it must specify the State's intention to subject itself to suit in *federal court.*" *Id.,* 105 S.Ct. at 3147. This Court has refused to deem an implied waiver to suit by a State from its mere participation, along with receipt of federal funds, in public welfare programs. *Atascadero State Hospital v. Scanlon,* — U.S. —, 105 S.Ct. 3142, 3150 (1985); *Edelman v. Jordan,* 415 U.S. 651, 673 (1974). The State of North Carolina has enacted no constitutional nor statutory provisions which would waive its Eleventh Amendment immunity to suit in federal court. *See, Dawkins v. Craig,* 483 F.2d 1191 (4th Cir. 1973).

Any attempt by the district court to engraft a waiver of the State's Eleventh Amendment immunity because of the prior 1971 injunction must fail. In *Pennhurst State School and Hospital v. Halderman,* 465 U.S. 89, 98 (1984), Justice Powell, writing for the majority, held that the principle of state sovereign immunity as embodied in the Eleventh Amendment is "a constitutional limitation on the federal judicial power established in Art. III." The *Pennhurst* Court was faced with the application of the Eleventh Amendment to pendent state-law claims and dealt directly with the judicial power of a federal court

to decide certain claims against a state. This Court concluded that the authority of the court to decide such claims did not override the absolute bar of the State's sovereign immunity. In reaching its conclusion that the Amendment removed the federal court's jurisdiction in *Pennhurst,* the Court analyzed as folows: "But pendent jurisdiction is a JUDGE-MADE DOCTRINE inferred from the general language of Art. III. The question presented is whether this doctrine may be viewed as displacing the explicit limitation on federal jurisdiction contained in the Eleventh Amendment." *Id.,* 465 U.S. at 117-118. (Emphasis added). The Court rejected arguments that "judicial economy, convenience, and fairness to litigants", i.e., consideration of judicial policy, could "override the constitutional limitation on the authority of the federal judiciary to adjudicate suits against a State." *Id.,* 465 U.S. at 121 and 123. It therefore logically follows that in *Gilliard v. Kirk,* the authority of the federal judge in enforcing an allegedly outstanding injunction could not overbalance the absolute jurisdictional bar of the Eleventh Amendment prohibiting the award of retroactive damages against a sovereign state in a federal court.

A judge-made decree simply cannot abolish rights and immunities guaranteed to the States by the United States Constitution. "The Eleventh Amendment is an explicit limitation of the judicial power of the United States. It deprives a federal court of power to decide certain claims against States that otherwise would be within the scope of Art. III's grant of jurisdiction. For example, if a lawsuit against state officials under 42 U.S.C. § 1983 alleges a constitutional claim, the federal court is barred from awarding damages against the state treasury even

though the claim arises under the Constitution." *Pennhurst State School and Hospital v. Halderman,* 465 U.S. 89, 119-120 (1984). If the 1971 injunction issued by the district court in *Gilliard v. Craig* were still in effect in 1984-1986, its mere presence did not confer on the district court the jurisdictional authority to adjudicate a claim and award retroactive damages against the State of North Carolina. The State Defendants were absolutely entitled to immunity from this type of relief under the Eleventh Amendment.

The fact that a permanent injunction was entered in 1971 has no effect on the principle, consistently adhered to by this Court, that the Eleventh Amendment bars a federal court from the award of retroactive payment of benefits by a State. *See, Edelman v. Jordan,* 415 U.S. 651 (1974). The district court below attempted to distinguish its action from that barred in *Edelman* by pointing out that in *Edelman* the state officials were under no court-imposed obligation to conform to a different standard. *Gilliard v. Kirk,* 633 F.Supp. 1529, 1563 (W.D.N.C. 1986). Upon the facts of this case, this is a distinction without a difference. This Court is very clear in its position that a federal court cannot award retroactive damages against a State. As was recently emphasized in *Green v. Mansour,* — U.S. —, 106 S.Ct. 423, 426 (1985): "compensatory or deterrence interests are insufficient to overcome the dictates of the Eleventh Amendment." Even where "[t]here is a dispute about the lawfulness of respondent's past actions, . . . the Eleventh Amendment would prohibit the award of money damages or restitution if that dispute were resolved in favor of petitioners." *Id.,* 106 S.Ct. at 428.

The *Green v. Mansour* Court of course did not prohibit all types of monetary relief ordered against a State.[2] Such an award is proper under the Eleventh Amendment if it is ancillary relief designed to remedy *ongoing* violations of federal law. As was true in the facts of *Green v. Mansour,* there is not now before this Court a claimed continuing violation of federal law nor any threat of state officials violating the now amended statute. The district court in *Gilliard v. Kirk* had no authority to order monetary and notice relief against the State of North Carolina designed to compensate the individual class members for alleged wrongful withholding of money by the State in the past.

An analogous factual and legal setting to *Gilliard v. Kirk* was even more recently presented in *Papasan v. Allain,* — U.S. —, 106 S.Ct. 2932 (1986), wherein this Court reaffirmed the absolute bar of the Eleventh Amendment in awarding retroactive damages to be paid from a state treasury. In that case, plaintiffs brought an action against state officials alleging, among other things, that the sale of certain school lands and unwise investment of the proceeds violated the State's trust obligation established on public school lands over 100 years ago. This Court was faced with the question of whether the plaintiffs' claims were barred by the Eleventh Amendment. The Court based its holding on the jurisdictional bar of the Eleventh Amendment and denied this aspect of the plaintiffs' claim. The Court very succinctly analyzed the

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[2] Although the State's discussion of the *Gilliard v. Kirk* retroactive relief centers on monetary relief, it should also be noted that retroactive notice and declaratory relief are prohibited as well under *Green v. Mansour,* — U.S. —, 106 S.Ct. 423 (1985).

present posture of the law regarding the Eleventh Amendment and the award of retroactive damages against a state as follows:

> " . . . this Court long ago held that the [Eleventh] Amendment bars suits against a State by citizens of that same State . . . '[I]n the absence of consent a suit in which the State or one of its agencies or departments is named as the defendant is proscribed by the Eleventh Amendment.' . . . This bar exists whether the relief sought is legal or equitable . . . *Ex parte Young*, 209 U.S. 123 (1908), held that a suit to enjoin as unconstitutional a state official's action was not barred by the Amendment . . . [*Young*] does not foreclose an Eleventh Amendment challenge where the official action is asserted as a matter of state law alone . . . *Young's* applicability has been tailored to conform as precisely as possible to those specific situations in which it is "necessary to permit the federal courts to vindicate federal rights and hold state officials responsible to 'the supreme authority of the United States.' " . . . Consequently, *Young* HAS BEEN FOCUSED ON CASES IN WHICH A VIOLATION OF FEDERAL LAW BY A STATE OFFICIAL IS ONGOING AS OPPOSED TO CASES IN WHICH FEDERAL LAW HAS BEEN VIOLATED AT ONE TIME OR OVER A PERIOD OF TIME IN THE PAST, AS WELL AS ON CASES IN WHICH THE RELIEF AGAINST THE STATE OFFICIAL DIRECTLY ENDS THE VIOLATION OF FEDERAL LAW AS OPPOSED TO CASES IN WHICH THAT RELIEF IS INTENDED INDIRECTLY TO ENCOURAGE COMPLIANCE WITH FEDERAL LAW THROUGH DETERRENCE OR DIRECTLY TO MEET THIRD-PARTY INTERESTS SUCH AS COMPENSATION. As we have noted: 'Remedies designed to end a continuing violation of federal law are necessary to vindicate the federal interest in assuring the supremacy of that law. BUT COMPENSATORY OR DETERRENCE INTERESTS ARE

INSUFFICIENT TO OVERCOME THE DICTATES OF THE ELEVENTH AMENDMENT.' " (Emphasis added).

*Id.*, 106 S.Ct. at 2939-2940.

The *Papasan* opinion clearly dictates that the *Gilliard* retroactive damages designed to compensate for past wrongs are absolutely barred by the Eleventh Amendment:

"RELIEF THAT IN ESSENCE SERVES TO COMPENSATE A PARTY INJURED IN THE PAST BY AN ACTION OF A STATE OFFICIAL IN HIS OFFICIAL CAPACITY THAT WAS ILLEGAL UNDER FEDERAL LAW IS BARRED EVEN WHEN THE STATE OFFICIAL IS THE NAMED DEFENDANT. THIS IS TRUE IF THE RELIEF IS EXPRESSLY DENOMINATED AS DAMAGES. *See,* e.g., *Ford Motor Co. v. Department of Treasury of Indiana,* 323 U.S. 459, 65 S.Ct. 347, 89 L.Ed. 389 (1945). IT IS ALSO TRUE IF THE RELIEF IS TANTAMOUNT TO AN AWARD OF DAMAGES FOR A PAST VIOLATION OF FEDERAL LAW, EVEN THOUGH STYLED AS SOMETHING ELSE. *See,* e.g., *Green v. Mansour, supra,* 474 U.S., at —, 106 S.Ct., at —; *Edelman v. Jordan,* 415 U.S. 651, 664-668, 94 S.Ct. 1347, 1356-1358, 39 L.Ed.2d 662 (1974). On the other hand, relief that serves directly to bring an end to a present violation of federal law is not **barred by the Eleventh Amendment** even though accompanied by a substantial ancillary effect on the state treasury. *See, Milliken v. Bradley,* 433 U.S. 267, 289-290, 97 S.Ct. 2749, 2761-2762, 53 L.Ed.2d 745 (1977); *Edelman, supra,* 415 U.S., *Id.* at 667-668, 94 S.Ct., at 1357-1358." (Emphasis added).

*Papasan v. Allain,* — U.S. —, 106 S.Ct. at 2932, 2940 (1986).

Most significantly, the *Papasan* Court concluded that the damages awarded by the lower court were barred

even if the land grants in question were regarded as a breach by the defendants of a continuing legal obligation. The petitioners in *Papasan* had contended that because the State was bound by a continuing legal obligation established in the past, they were seeking "only a prospective, injunctive remedy, permissible under *Ex parte Young.*" *Id.*, 106 S.Ct. at 2941. This argument was rejected out-of-hand by this Court as follows:

> "BUT EVEN IF PETITIONERS' LEGAL CHARACTERIZATION IS ACCEPTED, THEIR TRUST CLAIMS ARE BARRED BY THE ELEVENTH AMENDMENT. THE DISTINCTION BETWEEN A CONTINUING OBLIGATION ON THE PART OF THE TRUSTEE AND AN ONGOING LIABILITY FOR PAST BREACH OF TRUST IS THE SORT WE REJECTED IN *EDELMAN*. ESSENTIALLY A FORMAL DISTINCTION OF There, the Court of Appeals had upheld an award of 'equitable restitution' against the state official, requiring the payment to the plaintiff class of 'all AABD benefits wrongfully withheld.' 415 U.S., at 656, 94 S.Ct., at 1352. We found, to the contrary, that the 'retroactive award of monetary relief . . . is in practical effect indistinguishable in many aspects from an award of damages against the State.' *Id.* at 668, 94 S.Ct. at 1358.
>
> THE CHARACTERIZATION IN THAT CASE OF THE LEGAL WRONG AS THE CONTINUING WITHHOLDING OF ACCRUED BENEFITS IS VERY SIMILAR TO THE PETITIONERS' CHARACTERIZATION OF THE LEGAL WRONG HERE AS THE BREACH OF A CONTINUING OBLIGATION TO COMPLY WITH THE TRUST OBLIGATIONS. We discern no substantive difference between a not-yet-extinguished liability for a past breach of trust and the continuing obligation to meet trust responsibilities asserted by the petitioners. In both

> cases, the trustee is required, because of the past loss of the trust corpus, to use its own resources to take the place of the corpus or the lost income from the corpus. Even if the petitioners here were seeking only the payment of an amount equal to the income from the lost corpus, such payment would be merely a substitute for the return of the trust corpus itself. That is, continuing payment of the income from the lost corpus is essentially equivalent in economic terms to a one-time restoration of the lost corpus itself: It is in substance the award, as continuing income rather than as a lump sum, of " 'an accrued monetary liability.' " *Milliken v. Bradley*, 433 U.S., at 289, 97 S.Ct., at 2762 (quoting *Edelman*, 415 U.S., at 664, 94 S.Ct., at 1356). Thus, we hold that the petitioners' trust claim, like the claim we rejected in *Edelman*, may not be sustained." (Emphasis added).

*Id.*, 106 S.Ct. at 2941-2942.

The above quoted excerpts from *Papasan* specifically do away with the district court's order of retroactive damages in *Gilliard v. Kirk*. Violation of a "continuing legal obligation" will not be held of sufficient injury to overcome the Constitutional protection which a State possesses from an award of retroactive damages to individual plaintiffs in a federal forum. A federal courtroom is not an appropriate locale for adjudication of this type of claim. The 1971 injunction in *Gilliard*, even if considered by this Court to still be in effect, is not sufficient in law to overcome the jurisdictional bar of the Eleventh Amendment and permit the award of retroactive damages against the State of North Carolina by a federal district court.

The State Defendants are of course aware that, as this Court stated in *Hutto v. Finney*, 437 U.S. 678, 690 (1978), "[i]n exercising their prospective powers under

*Ex parte Young* and *Edelman v. Jordan*, federal courts are not reduced to issuing injunctions against state officers and hoping for compliance." Ancillary remedies to ongoing violations of federal law, such as that approved in *Millikin v. Bradley*, 433 U.S. 267 (1976), are not prohibited by the Eleventh Amendment. The contempt powers of the court, including the imposition of attorneys fees, are well-established. *Hutto v. Finney*, 437 U.S. 678 (1978). However, the above general language quoted from *Hutto v. Finney* may not be extended to allow a lower court to award retroactive compensatory damages against a sovereign state under the guise of its contempt powers. In *Kentucky v. Graham*, — U.S. —, 105 S.Ct. 3099 (1985), this Court declined to extend the above rationale enunciated in *Hutto* to the area of Eleventh Amendment jurisprudence. The Court stated: "*Hutto* holds only that, when a State in a § 1983 action has been prevailed against for relief on the merits, either because the State was a proper party defendant or because State officials properly were sued in their official capacity, fees may also be available from the State under § 1988." *Id.*, 105 S.Ct. at 3108. The award of retroactive damages against a State by a federal court cannot be justified by simply suing state officials in their official capacities for supposed violation of an injunction. *See, Kentucky v. Graham*, — U.S. —, 105 S.Ct. 3099 (1985). As this Court has repeatedly reaffirmed, in determining whether an award of monetary relief is the type of relief barred by the Eleventh Amendment or permitted under *Ex parte Young*, the Court will look to the substance rather than the form of the relief sought. *Edelman v. Jordan*, 415 U.S. 651 (1974); *Papasan v. Allain*, — U.S. —, 106 S.Ct. 2932 (1986).

The award of retroactive benefits by the district court below in order to compensate individual class members for money allegedly wrongfully withheld in the past is absolutely barred by the Eleventh Amendment to the United States Constitution.

## CONCLUSION

The judgment of the district court should be reversed in its totality.

Respectfully submitted,

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